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Case No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

RAUL VIVAS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Plaintiff-Respondent.

Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner Raul Vivas petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

QUESTIONS PRESENTED

1. Should the United States Government be permitted to extradite an individual from a foreign country based upon an indictment in a criminal case, but try the individual on a superseding indictment charging twenty additional and different counts without first seeking permission to do so from the country from which the individual was extradited?

2. Should the district court have recused itself from imposing sentence on Petitioner under 28 U.S.C. Section 455 where it compromised its impartiality by improperly injecting itself into plea negotiations with cooperating co-defendants by threatening them to provide testimony to "convict" Petitioner and by leading them to believe that the Court would not accept their pleas and would impose the maximum sentence on them if they did not provide such testimony?

3. Should the district court have recused itself from imposing sentence on Petitioner under 28 U.S.C. § 455 where, before any evidence was introduced at trial, the district court repeatedly announced its intention to maximize the sentences that it would impose at the end of the case?

LIST OF PARTIES WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Raul Vivas

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED	i
OPINIONS DELIVERED IN THE CASE	1
JURISDICTION	1
TREATIES	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT OF CERTIORARI	5
A. There is a conflict the Circuit Court of Appeals in applying a standard in determining whether the doctrine of specialty has been violated	6
B. The Ninth Circuit's Decision Conflicts with this Court's Decision In *Rauscher*	11
PETITIONER RAUL VIVAS JOINS IN THE CONCURRENTLY FILED JOINT PETITION FOR WRIT OF CERTIORARI OF PETITIONERS VAHE AND NAZARETH ANDONIAN	14
CONCLUSION	15
APPENDIX A-D	

TABLE OF AUTHORITIES

Cases

	Page
Fiocconi v. Attorney General 462 F.2d 475, (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972)	6
Kaiser v. Rutherford, 827 F.Supp. 832 (D.D.C. 1993)	7
United States v. Abello-Silva, 948 F.3d 1168 (10th Cir. 1991)	7, 8
United States v. Andonian, 29 F.3d 1432 (9th Cir. 1994)	9, 12, 13
United States v. Fowlie, 24 F.3d 1059 (9th Cir. 1994)	9, 10, 12, 13
United States v. Khan, 993 F.2d 1368 (9th Cir. 1993)	8, 9, 10, 12, 13
United States v. Levy, 905 F.2d 326 (10th Cir. 1990), *cert. denied*, 498 U.S. 1049 (1991)	8
United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962)	6, 9, 10
United States v. Rauscher, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886)	5, 6, 10, 11, 12, 13
United States v. Sensi, 879 F.2d 888 (D.C. Cir. 1989)	6, 7, 9, 10

Rules

Supreme Court Rules, Rule 12.2	14

TABLE OF AUTHORITIES

Page

Statutes

United States Code, Title 18
- Sec. 2 4
- Sec. 371 ..... 2, 4
- Sec. 1956(a) 2, 4

United States Code, Title 21, Sec. 846 4

United States Code, Title 28
- Sec. 455 ..... i, 14, 15
- Sec. 1254(1) 2

Treaties

Extradition Treaty Between the United States of America and Uruguay (April 6, 1973), Article 13 ... 2

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PETITION FOR WRIT OF CERTIORARI

OPINIONS DELIVERED IN THE CASE

The published portion of the opinion of the United States Court of Appeals for the Ninth Circuit is reported at 29 F.3d 1432 (9th Cir. 1994), and is reprinted in the appendix hereto at 1a-17a. The unpublished portion of the opinion of the Court of Appeals for the Ninth Circuit is reprinted in the appendix at 1b-24b. The decision of the United States District Court for the Central District of California is not reported.

JURISDICTION

1. On December 27, 1990, Petitioner Raul Vivas ("Petitioner") was found guilty of conspiracy and twenty counts of

laundering monetary instruments in violation of 18 U.S.C. Sections 371 and 1956(a). On August 21, 1991, Petitioner was sentenced to 505 years imprisonment.

2. On July 19, 1994, the United States Court of Appeals for the Ninth Circuit entered judgment affirming the conviction and sentencing of Petitioner.

3. On September 22, 1994, the United States Court of Appeals for the Ninth Circuit denied Petitioner's Petition for Rehearing and rejected the Suggestion for Rehearing En Banc.

4. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

TREATIES

Article 13 of the Extradition Treaty Between the United States Of America and Uruguay (April 6, 1973), provides as follows:

> A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted nor be extradited by that Party to a third State unless ... (3) ... the requested Party has manifested its consent to his detention, trial or punishment for an offense other than that for which extradition was granted or to his extradition to a third State provided such other offense is covered by Article 2. (App. at 1d.)

STATEMENT OF THE CASE

On February 22, 1989, Petitioner Raul Vivas was arrested in Uruguay pursuant to a request for provisional detention by the United States Embassy. On March 7, 1989, Petitioner Vivas was indicted by a federal grand jury sitting in Los Angeles for conspiracy to aid and abet the sale of

cocaine and to launder the proceeds thereof. On May 19, 1989, the Court of First Instance for Criminal and Juvenile matters in Uruguay granted the government's request for Vivas' extradition based on the original indictment. Vivas was ordered extradited on December 6, 1989.

On February 8, 1990, a Los Angeles grand jury returned a first superseding indictment charging Vivas with twenty new and different counts of laundering the proceeds of narcotics sales. The superseding indictment also varied from the original indictment in other crucial ways: (i) only five of the substantive counts in the superseding indictment — Counts 13, 14, 15, 19 and 25 — were the same as the counts charged in the original indictment; (ii) 23 of the 30 overt acts in the conspiracy counts in the superseding indictment were not in the original indictment; (iii) two of the remaining seven overt acts were expanded; (iv) 14 of the 21 overt acts in the original indictment were not contained in the superseding indictment; (v) there were numerous differences in the specific currency shipments described in the respective indictments; and (vi) there were also differences between the two indictments with respect to the entities allegedly involved in the conspiracy.

The United States never obtained and never attempted to obtain approval from Uruguay to try Vivas on the twenty new and different counts in the first superseding indictment. At oral argument before the Ninth Circuit Court of Appeals the government conceded that it could easily have sought such approval. Furthermore, the evidence that was presented to the Uruguayan courts in support of Vivas' extradition differed greatly from the evidence that was presented at his trial. In support of its request for Vivas' extradition, the United States government convinced Uruguay that it had evidence that Vivas was a drug dealer. Uruguay extradited Vivas because it believed he was a drug trafficker. At trial, however, the government introduced no

evidence or testimony that Vivas or any of the other defendants were drug dealers, saw any drug transactions, were involved in any drug transactions or were involved in an elaborate conspiracy to import cocaine into the United States.

Petitioner was tried with nine other defendants before the Honorable William D. Keller. The United States District Court for the Central District of California had jurisdiction of this case because the offenses charged arose under 18 U.S.C. Section 2, 18 U.S.C. Section 371 and 1956(a) and 21 U.S.C. Section 846. The trial lasted from May 22, 1990, to November 29, 1990. On December 27, 1990, the jury returned a verdict of guilty against Petitioner on counts 2 through 27 of the First Superseding Indictment, which included the twenty new and additional different counts that were never presented to the Uruguayan authorities for their approval. No verdict was reached on the conspiracy to aid and abet the sale of cocaine and that count was dismissed by the government at the time of sentencing.

On August 21, 1991, Petitioner was sentenced by Judge Keller to 505 years imprisonment (5 years on the conspiracy count and 20 years on each of 25 substantive money laundering counts, all terms of imprisonment to run consecutive with each other), and pay a fine of $7,580,000.

On August 30, 1991, Petitioner filed a timely Notice of Appeal. Oral argument was heard on November 1, 1993. On July 19, 1994, the United States Court of Appeals for the Ninth Circuit entered judgment in the case affirming the conviction and sentencing of Petitioner. On September 22, 1994, the United States Court of Appeals for the Ninth Circuit denied Petitioner's Petition for Rehearing and rejected the Suggestion for Rehearing En Banc.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The central issue in this case is whether the doctrine or rule of specialty prohibits the United States government from extraditing an individual from a foreign country based on an indictment charging certain counts, and then trying the individual on a superseding indictment charging twenty new and different counts. In the seminal case of *United States v. Rauscher*, 119 U.S. 407, 422-23, 7 S.Ct. 234, 30 L.Ed. 425 (1886), this Court held that under the doctrine of specialty, an individual *"can only be tried for the offense with which he is charged in the proceedings for his extradition,"* and for no other (emphasis added). In the instant case, Petitioner Raul Vivas was not tried "for the offense[s] with which he is charged in the proceedings for his extradition," *id.*, and the United States government did not seek or obtain permission from the surrendering country (Uruguay) to try Vivas on the new and different counts on which he was tried.

Review by this Court is necessary for two reasons. First, there is a conflict among the Second, Ninth, Tenth and District of Columbia Circuit Courts of Appeals as to the specific standard for applying the rule of specialty in cases where a defendant is extradited on one indictment but tried on a different superseding indictment. The conflicting standards in applying the doctrine of specialty are of critical legal and practical importance. First, there is no clear standard for the government and the courts to follow in cases where criminal defendants are extradited from foreign countries. Because of the uncertainty resulting from the conflict amongst the Circuits, defendants who are extradited from foreign countries do not know their rights. By this Court establishing a clear standard for district courts and courts of appeals to follow, there would be less confusion

concerning the rule of specialty and accordingly fewer appeals.

Second, the standard adopted by the Ninth Circuit below is clearly in conflict with this Court's long-standing decision in *Rauscher*. In *Rauscher*, this Court explicitly held that under the doctrine of specialty it is of "no importance" that the facts underlying the new and different offenses on which the government is seeking to try the defendant are the same as the facts underlying the offenses for which extradition was granted. The court below, however, held that Uruguay would not have objected to Vivas being tried on the twenty new and different counts because the facts underlying the new counts (for which extradition was not granted) were the same as the facts underlying the counts (for which extradition was granted). The Ninth Circuit's decision below is clearly in conflict with *Rauscher*.

Petitioner Vivas requests that this Court establish a clear rule that the doctrine of specialty requires the government to obtain explicit approval from the surrendering country that the United States can try the extradited individual on the new and different counts in the superseding indictment.

A. There is a conflict among the Circuit Courts of Appeals in applying a standard in determining whether the doctrine of specialty has been violated.

In the Second and District of Columbia Circuits the doctrine of specialty has been interpreted as requiring that "the prosecution be based on the *same facts* as those set forth in the request for extradition." *United States v. Sensi*, 879 F.2d 888, 895-96 (D.C.Cir. 1989) (emphasis added); *Fiocconi v. Attorney General*, 462 F.2d 475, (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972); *United States v. Paroutian*, 299 F.2d 486, 491 (2d Cir. 1962). Under this analysis, the courts in the United States are to surmise whether the extraditing country would consider the acts for which the

defendant is prosecuted as independent from those for which he is extradited. *Fiocconi, supra,* 462 F.2d at 481; *Paroutian, supra,* 299 F.2d at 490-91.

For example, in *Sensi,* the defendant was extradited from Great Britain on 18 counts of theft but was tried and convicted in this country on 26 counts of mail fraud, possession or receipt of stolen securities, theft, and transportation in interstate commerce of stolen securities and money. In deciding whether the doctrine of specialty was violated, the District of Columbia Circuit stated that its task was "to determine whether the *evidence* submitted with the United States' request for extradition sufficiently established the *facts* underlying Sensi's prosecution." 879 F.2d at 896 (emphasis added). The court held that the specialty doctrine was not violated because the evidence underlying the extradition was the same as that underlying the prosecution. *Id.; see also, Kaiser v. Rutherford,* 827 F.Supp. 832, 835 (D.D.C. 1993) ("doctrine of specialty simply requires that the prosecution be based on the same facts as set forth in the request for extradition").

The Tenth Circuit applies a different standard. The Tenth Circuit holds that in applying the specialty doctrine, courts should not focus on whether the facts underlying the extradition and trial are the same, but whether the charges or offenses are the same. In *United States v. Abello-Silva,* 948 F.3d 1168, 1174 (10th Cir. 1991), Abello was extradited from Colombia to the United States under a superseding indictment charging him with two counts: conspiracy to import controlled substances and conspiracy to possess with the intent to distribute marijuana and cocaine. After extradition, a second superseding indictment was obtained charging Abello with the identical two counts set forth in the first superseding indictment, but added more facts detailing Abello's illegal activities. In holding that the specialty doctrine was not violated, the Tenth Circuit "conclude[d] the

relevant inquiry is the nature of the offenses in the two indictments *and not the different 'facts' alleged in support of the offenses." Abello-Silva, supra*, 948 F.3d at 1174, *citing United States v. Levy*, 905 F.2d 326, 328 (10th Cir. 1990), *cert. denied*, 498 U.S. 1049 (1991) (emphasis added).

The Ninth Circuit does not have a consistent position or clear standard on the doctrine of specialty. In some decisions the Ninth Circuit has required that the government seek and obtain from the surrendering country *explicit* approval that the extradited individual be tried on the specific *counts* on which he is ultimately tried. For example, in *United States v. Khan*, 993 F.2d 1368 (9th Cir. 1993), a federal grand jury in Las Vegas returned a superseding indictment charging Khan with conspiracy to import heroin in violation of 21 U.S.C. Section 963 (Count II) and use of a communication facility to facilitate the heroin conspiracy in violation of 21 U.S.C. Section 2 (Count VIII). While it was clear that Pakistan agreed to extradite Khan on Count II, it was not clear that it agreed to extradite Khan on Count VIII. In reversing Khan's conviction on Count VIII, the Ninth Circuit held:

> The opinion in *United States v. Sensi* is not dispositive. In *Sensi*, 879 F.2d at 896, the D.C. Circuit focused on the evidence submitted with the United States' request for extradition and found it sufficient to support each count of the indictment. . . .
>
> . . . *We are not convinced that the doctrine of specialty is satisfied under all treaties as long as the prosecution is based on the same facts as those set forth in the request for extradition.*
>
> Language from our opinions in *Van Cauwenberghe* and *Quinn*, "for any offense other than that for which the surrendering state agreed to extradite," suggests the need for an *affirmative statement* by the surrendering

> country of the counts upon which the extradition is based.
>
> The extradition materials do not indicate that Pakistan unambiguously agreed to extradite Khan on both Counts II and VIII. The magistrate found it persuasive that "the commissioner's report does not suggest that Khan ought not to be extradited on the charge contained in Count VIII." *But we will not infer an agreement to extradite from Pakistan's silence concerning Count VIII.*

993. F.2d at 1374 (emphasis in original and added); *see also, United States v. Fowlie*, 24 F.3d 1059, 1064 (9th Cir. 1994) (citing *Khan* in holding that "[t]he specialty doctrine prevents the requesting nation from prosecuting an extradited individual for crimes other than those as to which the rendering state *explicitly* granted extradition.") (emphasis added).

The Ninth Circuit in this case, however, did not apply the standard established in *Khan* and *Fowlie*, but instead applied the standard adopted by the Second and District of Columbia Circuits. In affirming Vivas' conviction below, the Ninth Circuit, citing *Sensi, supra* (which the *Khan* court declined to follow), and *Paroutian, supra*, held that "the appropriate test for this case is 'whether the extraditing country would consider the *acts* for which the defendant was prosecuted as independent from those for which he was extradited.'" *United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994). The court below refused to follow *Khan* and require the government to obtain affirmative consent from Uruguay to try Vivas on the twenty different counts in the superseding indictment. *See* 29 F.3d at 1436.

These conflicts warrant review by this Court. Presently there is no clear, uniform standard for United States Attorneys and courts to follow. If the government wishes to try an

extradited individual on a superseding indictment returned after the extradition, there is presently no clear standard for determining whether the new counts charged in the superseding indictment are the same "offenses which [the defendant] is charged in the proceedings for his extradition," *Rauscher, supra*, 119 U.S. at 421, 422-23, and 430, so that the doctrine of specialty is satisfied. Does the doctrine of specialty require that the defendant be tried only on the same counts as he was extradited, as held in *Khan* and *Fowlie*, or is the doctrine of specialty satisfied if the trial is based on the same facts as presented to the extraditing country, as held in *Sensi, Paroutian* and the Ninth Circuit in this case?

Moreover, as suggested by one of the Circuit Judges at oral argument below, a bright line rule would be appropriate and would serve to protect American citizens who are extradited to other countries.[1] Circuit Judge Trott expressed the concern that courts in this country would agree to extradite American citizens to foreign countries to stand trial on certain specified counts without any assurances that the foreign country would not try the individual on a multitude of new and different counts. (App. at 2c.) Judge Trott further expressed the concern that without a clear rule, every case involving a trial on counts different from those for which the defendant was extradited would result in an appeal on the specialty issue. (App. at 4c-5c.) Judge Trott stated that with a clear rule there would be no issue of whether or not the specialty doctrine was violated; courts would not have to inquire into whether the superseding counts arise out of the same set of facts as those on which the defendant is extradited. (App. at 7c-8c.) Judge Trott and the other panel judges in the instant case, however,

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[1]A transcription of the relevant portions the oral argument before the Court of Appeals for the Ninth Circuit is attached in the appendix at 1c-8c.

refused to follow the clear standard established in *Khan* and *Fowlie*. By refusing to follow *Khan* and *Fowlie*, the Court below instead created greater confusion.

B. The Ninth Circuit's Decision Below Conflicts with this Court's Decision In *Rauscher*.

The standard adopted by the Second and District of Columbia Circuits and the Ninth Circuit's decision in this case — which attempts to determine whether the evidence presented at the extradition hearing and at trial is the same — is clearly in conflict with this Court's decision in *Rauscher*. In *Rauscher*, this Court held that the doctrine of specialty was violated because the defendant was extradited on the charge of murder on the high seas and tried for infliction of cruel and unusual punishment. This Court specifically addressed the argument that the doctrine of specialty was not violated because evidence supporting the charge of murder was the same as the evidence supporting the charge of infliction of cruel and unusual punishment. In rejecting this argument, this Court held:

> The other observation we have to make regards an argument presented in this particular case, namely, that the prisoner was convicted on the same testimony which was produced before the magistrate who ordered his extradition. . . .
>
> *. . . [W]e are of the opinion that no importance should be attached to this matter, even if it were found that the party was convicted of inflicting cruel and unusual punishment on the seaman on the same evidence precisely upon which the committing magistrate in Great Britain delivered him up under a charge of murder.* . . . 119 U.S. at 431-32 (emphasis added).

Rauscher, therefore, is clear that a court in this country cannot presume that a court in another country will agree to extradite an individual for a different offense merely because

the evidence presented at the extradition hearing will also support the new offense charged. Yet, in affirming Vivas' conviction on the new counts charged in the superseding indictment, the Ninth Circuit examined the order authorizing Vivas' extradition which "contain[ed] a detailed recitation of Vivas' alleged crimes," and concluded that it was "confident" that Uruguay would have agreed to extradite Vivas on the twenty new counts in the superseding indictment. 29 F.3d at 1437. The Ninth Circuit ignored this Court's ruling in *Rauscher* and its decision below is clearly in conflict with *Rauscher.*

Petitioner Vivas believes that the *Khan* and *Fowlie* decisions correctly interpret *Rauscher.* Petitioner Vivas requests that this Court adopt the standard set forth in those decisions and establish a clear rule requiring the government to obtain explicit approval from the surrendering country that the United States can try the extradited individual on the new and different counts in the superseding indictment. The standard adopted by the Second and District of Columbia Circuits and the Ninth Circuit's decision in this case will have pernicious consequences. Under this standard, the United States or a foreign country can add an unlimited number of offenses to an indictment after extradition as long as those offenses are based upon the same set of facts as the offenses on which the individual was extradited. As Circuit Judge Trott pointed out at oral argument, under the government's analysis of the specialty doctrine (which was ultimately adopted by the Ninth Circuit), an American citizen could be extradited to a foreign country for committing a murder or bank robbery but could be tried for additional murders or bank robberies as long as they arise from the same set of facts. (App. at 2c and 7c.)

Finally, there is a danger in allowing courts in this country to surmise what the surrendering country would do if the facts and evidence at trial were presented at the extradition

hearing. The instant case is a good example of how the courts in this country may have incorrectly guessed what the courts in Uruguay would have done if presented with the same counts and facts that were introduced at trial. As described above, the evidence that was presented to the Uruguayan courts in support of Vivas' extradition on the original indictment differed greatly from the evidence that was presented at his trial on the superseding indictment. The United States government convinced Uruguay that it had evidence that Vivas imported cocaine into the United States, sold it, and then laundered the proceeds from the drug sales. The opinion of the Uruguayan court presiding over the extradition hearing is clear that the court agreed to extradite Vivas because it believed that the United States had evidence of narcotics sales. *See, Andonian, supra*, 29 F.3d at 1437. *The truth was that the government had no evidence that Vivas was a drug dealer.* At trial, the government introduced no evidence that Vivas or any of the other defendants were drug dealers or were involved in any drug transactions.

Given that both the charges and the facts on which Vivas was tried were different from those presented to and considered by the Uruguayan courts, it is contrary to *Rauscher* for the courts below to guess what the Uruguayan courts would have done. The only way for the courts in this country to know whether Uruguay would have extradited Vivas on the offenses charged in the superseding indictment would have been to present the superseding charges to the Uruguayan authorities. Even though at oral argument it conceded that could easily have done so, the government did not attempt to obtain permission from Uruguay to try Vivas on the counts and evidence set forth in the superseding indictment.

This Court should hold that the *Khan* and *Fowlie* interpretation of *Rauscher* is correct and hold that the doctrine of specialty requires that if the government wishes to try an

extradited individual on counts in a superseding indictment which are different from those in the indictment on which the extradition was based, the government is required to obtain an affirmative statement by the surrendering country that it is permissible for the United States government to do so.

PETITIONER RAUL VIVAS JOINS IN THE CONCURRENTLY FILED JOINT PETITION FOR WRIT OF CERTIORARI OF PETITIONERS VAHE AND NAZARETH ANDONIAN

Pursuant to Rule 12.2 of the Supreme Court Rules, Petitioner Raul Vivas hereby joins in the concurrently filed Petition for Writ of Certiorari filed by Petitioners Vahe Andonian and Nazareth Andonian.

Petitioners Vahe Andonian and Nazareth Andonian were convicted in the same judgment as Petitioner Raul Vivas and were also sentenced to 505 years imprisonment. In their Joint Petition, Petitioners Vahe Andonian and Nazareth Andonian seek review by this Court on two issues:

1. Whether the district court should have recused itself from imposing sentence on Petitioners under 28 U.S.C. Section 455 where it compromised its impartiality by improperly injecting itself into plea negotiations with cooperating co-defendants by threatening them to provide testimony to "convict" Petitioner and by leading them to believe that the Court would not accept their pleas and would impose the maximum sentence on them if they did not provide such testimony.

2. Whether the district court should have recused itself from imposing sentence on Petitioners under 28 U.S.C. Section 455 where, before any evidence was introduced at trial, the district court repeatedly an-

nounced its intention to maximize the sentences that it would impose at the end of the case.

The fact that the district court imposed maximum sentences of 505 years, as it said it would prior to hearing any evidence, shows that it lacked impartiality required of district courts under 28 U.S.C. Section 455. The district court's lack of impartiality foreclosed the opportunity for Petitioners to have a fair trial and sentencing.

CONCLUSION

For the foregoing reasons, Petitioner Vivas respectfully requests that the Court grant this petition for a writ of certiorari.

Respectfully submitted,

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